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January 25, 1999

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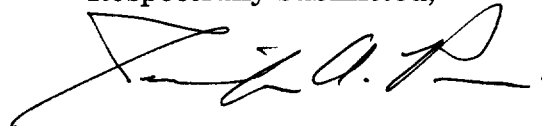
**Re: 1998 Biennial Regulatory Review – Spectrum
Aggregation Limits for Wireless Telecommunications
Carriers, CC Docket No. 98-205**

Dear Ms. Salas:

Pursuant to Public Notice FCC 98-308, released December 10, 1998, on behalf of the Telecommunications Resellers Association, I am enclosing for filing in the referenced proceeding an original and four copies of the Comments of the Telecommunications Resellers Association. Please file stamp and return one copy of the Comments (additional copy provided).

Please contact me if you have any questions.

Respectfully submitted,



Jennifer A. Purvis
Counsel for Telecommunications
Resellers Association

Enclosures

cc: Attached service list

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**Before the
FEDERAL COMMUNICATIONS COMMISSION**

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In the Matter of)
)
1998 Biennial Regulatory Review --)
Spectrum Aggregation Limits for)
Wireless Telecommunications Carriers)
)
Cellular Telecommunications Industry)
Association's Petition for Forbearance)
from the 45 MHz CMRS Spectrum Cap)
)
Amendment of Parts 20 and 24 of the)
Commission's Rules -- Broadband PCS)
Competitive Bidding and the Commercial)
Mobile Radio Service Spectrum Cap)
)
Implementation of Sections 3(n) and)
332 of the Communications Act)
)
Regulatory Treatment of Mobile Services)

WT Docket No. 98-205

WT Docket No. 96-59

GN Docket No. 93-252

**COMMENTS OF
THE TELECOMMUNICATIONS RESELLERS ASSOCIATION**

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January 25, 1999

SUMMARY

The Commission should retain, without modification, both the 45 MHz CMRS spectrum cap and the current restriction on cellular cross-ownership. These rules have been central to the nascent development of competition in the CMRS market. They also remain essential to ensuring entry by the maximum possible number of facilities-based providers in the CMRS market. By promoting such entry, moreover, these rules will facilitate unrestricted wireless resale, maximize the number of full service providers in the market, increase the likelihood that wireless services will develop as a competitive alternative to wireline services, and minimize the level of regulation needed in the industry.

The Commission also should reject an approach whereby the spectrum cap would be lifted if there were a certain number of providers in a given geographic market. There is no way for the Commission to determine what magic number of providers constitutes “enough” competition in a market, particularly given the impediment to competition created by the lack of wireless number portability and the fact that many wireless services are not always easily substitutable. There likewise is no way for the Commission to predict when competition will be sufficient to justify a sunset of the spectrum cap. In addition, forbearance from enforcing these rules cannot be justified, as none of the three prongs of the Section 10 forbearance test can be met.

With the forces of consolidation now sweeping this and other areas of the telecommunications industry, a modification or elimination of these rules at this

time would likely permit an irreversible reconcentration of both the CMRS market and the market for full-service providers. The spectrum cap and cellular cross-ownership restrictions have struck a careful -- and successful -- balance between promoting efficiency and promoting competition. The Commission should not modify or eliminate these rules just as their pro-competitive effects are beginning to take root.

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**Before the
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| |) | |
| Regulatory Treatment of Mobile Services |) | |

**COMMENTS OF
THE TELECOMMUNICATIONS RESELLERS ASSOCIATION**

The Telecommunications Resellers Association ("TRA"), by its attorneys, hereby submits its comments on the Notice of Proposed Rulemaking ("NPRM") issued December 10, 1998, in the above-captioned proceeding. 1/ The NPRM seeks comment on whether the Commission should retain, modify, or repeal the 45 MHz Commercial Mobile Radio Services ("CMRS") spectrum cap. It also seeks comment on whether to eliminate the current restriction on cellular cross-ownership. TRA urges the Commission to retain, without modification, both the

1/ Notice of Proposed Rulemaking, WT Docket Nos. 98-205 and 96-59, GN Docket No. 93-252, FCC 98-308 (rel. Dec. 10, 1998) ("NPRM").

CMRS spectrum cap and the cellular cross-ownership rule, because they contribute heavily to competition in the wireless industry and strike the correct balance between the need for economies of scale and scope on the one hand, and the need for a diversity of competing service providers on the other.

INTRODUCTION

The Telecommunications Resellers Association (or TRA) is a national trade association representing more than 775 entities engaged in, or providing products and services in support of, telecommunications resale. TRA's members provide a wide range of telecommunications services in all markets -- local wireline, interexchange, and wireless. While TRA's reseller members generally enter the market through the resale of services, many members eventually grow to the point where they invest in telecommunications network facilities as well.

Resellers take advantage of a diversity of facilities-based networks to provide a wide range of choice to their own customers. The competition among facilities-based providers is enhanced greatly by the participation of resellers. The interexchange market is perhaps the best example of the benefits that can flow from a diversity of facilities-based and resale service providers. That market is served by a multiplicity of facilities-based carriers with nationwide networks and many more carriers with regional networks. There are hundreds of resale-based carriers in the interexchange market as well. The wireless market -- and wireless consumers -- stand to benefit from a similar number and diversity of facilities-based and resale

service providers. Retention of the CMRS spectrum cap and cellular cross-ownership rules is essential to achieving those goals.

I. THE CMRS SPECTRUM CAP HAS CONTRIBUTED GREATLY TO THE INCREASE IN COMPETITION IN THE CMRS MARKET.

As the Commission recognized in both the NPRM and the Commission's Third Annual CMRS Competition Report, competition in the CMRS is growing. ^{2/} The grant of additional spectrum for PCS -- and the CMRS spectrum cap -- have been critical to making this recent development of competition possible.

The NPRM and the Third Annual CMRS Competition Report also recognize, however, that competition in the CMRS market is "still in its early stages." ^{3/} Indeed, the NPRM acknowledges that many licensees have not even completed the initial phases of their network buildouts. ^{4/} The Commission should give the CMRS market a chance to develop as many competitors as possible before considering any removal or modification of the CMRS spectrum cap. By maximizing the number of competitors in the market, the Commission will maximize both the choices available to consumers and the incentives of competitors to reduce prices and offer innovative services.

^{2/} NPRM at para. 30, 34; Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with respect to Commercial Mobile Services, Third Report, FCC 98-81 (rel. June 11, 1998) ("Third Annual CMRS Competition Report") at 2.

^{3/} NPRM at para. 34, Third Annual CMRS Competition Report at 2.

^{4/} NPRM at para. 35.

A removal or modification of the CMRS spectrum cap at this time would reverse the nascent emergence of competition in the CMRS market and open the door to the forces of consolidation now sweeping other areas of the telecommunications industry. The Third Annual CMRS Competition Report concluded that a process of consolidation already

can be observed in various CMRS services as licensees acquire new licenses to gain the efficiencies of larger footprints and the marketing possibilities of multiple product offerings. This process is most evident in the paging/messaging industry. Furthermore, it is possible that there will be a period of increased consolidation activity among broadband PCS licensees as competitive forces act upon the mobile telephone industry. 5/

The Report notes that this trend toward consolidation has not “significantly” reduced the number of providers of a given CMRS service within a geographic market. 6/

The avoidance of consolidation to date, however, is due in large measure to the existence of the CMRS spectrum cap. As the Commission observed in the NPRM:

The competitive evolution of these markets may be traced directly to our decisions to auction additional spectrum well-suited to the provision of mobile communications, and to impose limits on the extent to which firms were permitted to aggregate spectrum in these auctions. 7/

5/ Third CMRS Competition Report at 5 [footnotes omitted].

6/ Id.

7/ NPRM at para. 35.

The fact that the Commission's policies have begun to work does not mean the Commission should suddenly undo those policies. On the contrary, the evidence of emerging PCS competition is the best evidence that the spectrum cap is beginning to do its job and should remain in place. In those markets where new PCS or SMR providers have become established, increased price and service competition have been the direct result. Additional entrants would place even more downward pressure on price. The Commission should allow the maximum benefits of its spectrum cap to develop, rather than halting the progress toward diversity.

Indeed, the Commission observed in the NPRM:

We [] believe that with respect to mobile wireless services, the spectrum cap has served the purpose of constraining the undesirable erosion of existing competition through mergers or acquisitions in major markets where competition among multiple carriers is most advanced. For cellular and SMR incumbents especially, and perhaps for the early A- and B-Block broadband PCS entrants as well, we believe that incentives exist for operational carriers to explore in-market merger options. Hence, it appears likely that our spectrum aggregation limit has been of some value in inhibiting competition-eroding spectrum consolidation. 8/

A removal or modification of the CMRS spectrum cap would permit a reconcentration in the wireless market, with the likely eventual reduction in the number of facilities-based wireless providers in each market. Mergers in the wireless market would likely involve both providers of stand-alone wireless services and providers of full-service or bundled service offerings.

8/ Id. at para. 37 [footnotes omitted].

Once the spectrum cap is lifted, moreover, the damage to competition and consumer choice would be irreversible. If the spectrum cap were lifted, the Commission could find itself faced with a return to a market not much different from the concentrated duopoly environment it rejected in 1994. 9/

II. THERE IS NO SET NUMBER OF CMRS SERVICE PROVIDERS THAT IS ENOUGH.

The Commission seeks comment on a possible approach that would allow the spectrum cap to be lifted if there were at least a certain number of wireless providers in a market. 10/ Such an approach is ill-advised. The greater the number of providers, the more competition and choice for consumers there will be, and the less the Commission will need to regulate this market. In addition, there can be no magic number that is “enough” to permit reconcentration (and a reduction in that magic number) to take place.

In addition, measuring competition by the simple number of wireless providers is by nature an incorrect assessment of the real number of competitive choices facing consumers. In analyzing the number of competitors and the amount of consumer choice in the wireless market, the Commission must do more than simply count the number of service providers in each market.

First, wireless services are not always easily substitutable for each other. Many existing mobile phones are not capable of operating in multiple modes

9/ See Id. at paras. 2, 16.

10/ NPRM at para. 56.

(i.e. they are limited to one or another cellular, PCS, or SMR frequency block). 11/ The adoption of multiple, incompatible digital cellular standards will make it even more difficult to develop such multi-mode phones in the future. The fact that several different technologies -- and thus several different, incompatible handsets -- exist for CMRS means that consumers have relatively few choices for a competing carrier unless they are willing to forego their investment in their existing handsets and purchase new ones.

Second, the lack of wireless number portability also impedes customers' ability and incentive to switch carriers in response to lower prices and better service. Unlike the interexchange or local wireline markets, where number portability is not an obstacle, wireless consumers must change their wireless phone numbers in order to switch to a better, cheaper provider. Wireless number portability is not due to be implemented until March 31, 2000. Most of the wireless carriers are pressing to extend or eliminate that deadline.

In sum, it is not enough simply to look at the number of wireless licensees in each market in order to determine whether there are "enough" licensees to make the market sufficiently competitive to allow reconcentration.

11/ Those phones that are capable of multi-mode operation generally are more expensive.

III. VIGOROUS RESALE-BASED COMPETITION DEPENDS ON THE EXISTENCE OF A LARGE NUMBER OF COMPETING WIRELESS PROVIDERS.

As the Commission already has recognized, facilities-based providers (including PCS and SMRS carriers) have resisted allowing unrestricted resale of their wireless services. ^{12/} As a result, in the wireless market, in contrast to the interexchange market, resellers have not always been able to fulfill their critical role of preventing price discrimination, bringing lower prices to smaller consumers, spurring innovation, and creating price competition. In the absence of unrestricted resale competition, it is even more important that there be a large number of facilities-based carriers for consumers to choose from. The larger the number of facilities-based carriers, the more likely it is that those carriers will be forced to see resellers as carrier-customers, not as competitors, and will seek out resellers' business as a way to attract traffic.

The Commission's own resale policies assume that there will be a large number of wireless licensees in each market. In deciding to sunset the resale obligation after the five-year PCS build-out period, the Commission relied upon the large number of PCS providers that would exist by the end of that time.^{13/} The

^{12/} Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance For Broadband Personal Communications Services, WT Docket No. 98-100 et al., FCC 98-134, released July 2, 1998, at para. 38 &n.114.

^{13/} Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, First Report and Order, CC Docket No. 94-54, 11 FCC Rcd 18455, FCC 96-23, released July 12, 1996, at paras. 23-24.

Commission concluded that the large number of CMRS licensees would make it unnecessary to have a rule mandating resale. ^{14/} If the Commission were to lift or modify the CMRS spectrum cap or revise the cellular cross-ownership rule, it would have to eliminate the sunset of the resale requirement as well, since the basis for the sunset would be gone.

IV. THE SPECTRUM CAP INCREASES THE LIKELIHOOD OF WIRELESS/WIRELINE COMPETITION.

Promoting the maximum number of competitors in the CMRS market will also increase the likelihood that wireless services will develop as a competitive alternative to wireline services. In most markets, one of the strongest providers of wireless services is the incumbent local exchange carrier. ^{15/} The Commission should endeavor to maximize the number of other CMRS licensees in order to maximize the likelihood that one or more of them will choose to compete head-to-head with the incumbent LEC. Additional potential providers of mobile wireless or fixed wireless local exchange service are necessary in order to maximize the chances for a broad-based alternative provider of local exchange service.

The Commission should also be skeptical of claims that 45 MHz of spectrum is not enough to permit such wireless local competition to develop. Simply

^{14/} TRA has vigorously opposed any sunset of the resale obligation, even if there are a large number of CMRS licensees operational at the time of sunset.

^{15/} Many of the largest CMRS providers in the market today are owned by large incumbent local exchange carriers (GTE and the Regional Bell Operating Companies ("RBOCs")). Even if those providers eventually deploy wireless local loops, they would often be simply competing against themselves.

lifting the cap will not necessarily lead to such competition, and may actually deter it, if it effectively eliminates the licensee that might have the strongest incentives to compete with the incumbent LEC. A larger number of wireless licensees is more likely to lead to a scenario in which at least one licensee will focus on wireless local loop or other innovative uses of the spectrum.

V. IN ADOPTING THE 45 MHZ SPECTRUM CAP, THE COMMISSION STRUCK THE CORRECT BALANCE BETWEEN EFFICIENCY AND COMPETITION.

Retention of the spectrum cap would not prevent CMRS providers from achieving economies of scope and scale in the provision of their services. Rather, the cap allows significant accumulation of spectrum by a single provider, and the consequent realization of substantial scale and scope economies. In other words, the spectrum cap was -- and is -- carefully crafted to strike a balance between preventing the anticompetitive aggregation of spectrum on one hand and permitting the achievement of economies of scale and scope on the other. Indeed, as the Commission notes in the NPRM, the spectrum cap was designed to “add certainty to the marketplace without sacrificing the benefits of pro-competitive and efficiency-enhancing aggregation.” ^{16/} There is no reason to now disturb this successful balance, just as competition has begun to develop.

Retention of the spectrum cap is also essential to ensure competition in the CMRS market because, even without further consolidation, the number of

^{16/} NPRM at para 10.

facilities-based competitors that can ultimately provide CMRS services is inherently limited. In other markets, such as the long distance market, there is no limit to the number of entrants that can build new facilities and provide competitive services to consumers. In the CMRS market, by contrast, the finite amount of spectrum available for the provision of CMRS services limits the number of facilities-based competitors that can enter the market. The Commission should not exacerbate this artificial limitation on entry by decreasing the number of service providers through lifting the spectrum cap.

IV. THE SPECTRUM CAP IS NECESSARY TO ENSURE VIGOROUS FULL-SERVICE COMPETITION.

The development of vigorous competition in the provision of full-service offerings that include wireless, local, long distance, and other services also would be limited if the spectrum cap is lifted. In this era of vertical integration and increasing concentration in the telecommunications markets, and given the consumer demand for one-stop shopping, it is essential that the Commission preserve and promote the ability of a wide range of companies to offer full-service packages to consumers. The trend toward consolidation and the inherent spectrum-based limitation on the number of facilities-based providers that can provide services in the CMRS market, however, restrict the number of competitors that can provide full-service offerings. Retention of the spectrum cap without modification is necessary if the Commission is to maximize the number of full service providers in the marketplace.

Maximizing the number of facilities-based providers in the market also enhances the additional competition and consumer choice offered by wireless resellers. Having a variety of facilities-based providers from whom to purchase services helps resellers offer the best services at the lowest possible prices.

VII. LIFTING THE SPECTRUM CAP WOULD INCREASE THE NEED FOR REGULATION OF THE CMRS INDUSTRY.

The Commission states that one of its guiding principles in this and other proceedings is to minimize regulation and rely as much as possible on market forces to advance the public interest. Removal or modification of the spectrum cap, however, would increase rather than decrease the need for regulation. Reliance on market forces is possible only where there are a sufficient number of strong competitors in a given market. A removal of the spectrum cap would reduce the already limited number of competitors in the CMRS market. The Commission's desire to rely on market forces in lieu of direct regulation would not be justifiable in that instance.

In the interexchange market, the Commission was able to deregulate the dominant provider (AT&T) because of the number of competitors. The CMRS market, by contrast, is not yet characterized by such a multiplicity of networks and easy resale. As a result, removal of the spectrum cap would actually create a need for additional regulation and policing by the Commission in the CMRS market.

VIII. THE COMMISSION SHOULD RETAIN THE CELLULAR CROSS-OWNERSHIP RULE.

For the same reasons that the 45 MHz spectrum cap is in the public interest, the ban on cellular cross-ownership also should be retained. The cellular service providers remain the incumbent providers of wireless mobile services everywhere in this country. If they were allowed to join forces, competition would be seriously limited in every market. Even in markets where PCS and SMR providers have begun to penetrate the cellular duopoly, it is essential to maintain as many strong facilities-based wireless service providers as possible, for all the reasons given above.

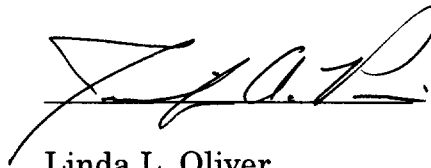
IX. NEITHER SUNSET OR FORBEARANCE CAN BE JUSTIFIED.

For all the reasons given above in favor of retaining the 45 Mhz spectrum cap, it is equally clear that CTIA's request for forbearance under Section 10 must fail. None of the three prongs of the statutory test can be met. Similarly, a sunset of the spectrum cap cannot be justified. There is no "end point" to the need for vigorous competition from a wide range of service providers. Moreover, the Commission does not possess a crystal ball that would enable it to know today whether and when elimination of the cap could be justified in the future.

CONCLUSION

For the foregoing reasons, the Commission should retain the CMRS spectrum cap without modification. Competition in the CMRS market is still very much in its infancy. The Commission should not roll back the progress made to date by removing this carefully balanced and critically important limit on spectrum aggregation.

Respectfully submitted,



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January 25, 1999

CERTIFICATE OF SERVICE

I, Barbara E. Clocker, hereby certify that a copy of the foregoing
Comments of the Telecommunications Resellers Association, filed in WT Docket No.
98-205, was served by hand delivery upon the following:


Barbara E. Clocker

Dated: January 25, 1999

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